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No. ———

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.,*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit, in disregard of the fundamental postulates of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, improperly invalidated regulations promulgated by the Federal Communications Commission implementing the landmark Telecommunications Act of 1996—in particular, the FCC rule prohibiting incumbent local monopolists from engaging in discriminatory conduct against new entrants seeking to use parts of the existing local network—and thereby thwarted Congress' goal of creating competition in local markets as quickly as possible.

2. Whether, in light of the explicit grants of authority to the FCC to establish regulations to implement the requirements of the local competition provisions of the Telecommunications Act of 1996, the Eighth Circuit improperly held that the FCC exceeded its jurisdiction when it promulgated regulations implementing the pricing and other important requirements of the Act, on the theory that the regulations applied to intrastate matters relegated to the jurisdiction of state public utility commissions.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in the Appendix at 1a-4a, 73a-79a, 92a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation. MCI has the following non-wholly owned subsidiaries: General Communications, Inc.; IFP Holdings, Inc.; ICS Communications, Inc.; Digital Network Television, Inc.; Genesys Telecommunications, Inc.; Inflight Phone Corp.; Multimedia Medical Systems, Inc.; News T Investments, Inc.; News Triangle Finance, Inc.; Pioneer Holding L.L.C.; and Security Technologies, Inc.

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MCI Telecommunications Corporation ("MCI") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The initial decision of the Eighth Circuit reviewing the First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 8, 1996) ("*Local Competition Order*"), issued by the Federal Communications Commission ("FCC"), is reported at 120 F.3d 753, and is reprinted in the appendix ("Pet. App.") at 1a.[1] The subsequent decision of the Eighth Circuit granting certain respondents' petitions for rehearing is unreported, and is reprinted at Pet. App. 69a. The FCC's *Local Competition Order* is reported at 11 FCC Rcd. 15499 (1996). Relevant excerpts of that order and the accompanying regulations, codified at 47 C.F.R. §§ 51.1-51.809, are reprinted at Pet. App. 131a-353a.[2] The decision of the Eighth Circuit reviewing the FCC's Second Report and Order in its local competition rulemaking (11 FCC Rcd. 19392 (1996)) is reported at 124 F.3d 934, and is reprinted at Pet. App. 73a.

JURISDICTION

The Eighth Circuit issued its decision on rehearing and its mandate on October 14, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).[3]

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, codi-

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[1] Pursuant to discussions with the Clerk's Office, petitioner MCI is not filing its own appendix. Citations herein refer to the appendix filed by AT&T *et al.*

[2] Fifteen copies of the *Local Competition Order* have been lodged with the Court.

[3] The Court of Appeals had jurisdiction to review the FCC's regulations pursuant to 28 U.S.C. § 2342(i) and 47 U.S.C. § 402(a).

fied at 47 U.S.C. §§ 151-276. The most relevant provisions are reprinted at Pet. App. 93a-130a.

STATEMENT OF THE CASE

This petition seeks review of Eighth Circuit decisions vacating FCC regulations implementing the 1996 Act, a landmark statute designed "to shift monopoly [local telephone] markets to competition as quickly as possible." [4] In the 1996 Act, Congress asserted federal jurisdiction over local telecommunications matters that had previously been left to the States. Congress did so because historically the States had fostered monopoly provision of local phone service, and Congress desired a uniform national policy "promot[ing] competition in the local telephone service market." *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2338 (1997). To ensure *rapid* execution of that policy, Congress required the FCC to "establish regulations to implement" the Act's requirements within six months of the Act's passage. 47 U.S.C. § 251 (d)(1). The FCC met that deadline. The Eighth Circuit has now invalidated many of those regulations, crippling the prospects for local competition.

The Regulatory Structure Prior to 1996. The Communications Act of 1934 divided responsibility for regulation of telecommunications markets into well-defined (albeit overlapping) spheres: federally-regulated interstate services, and state-regulated intrastate services. 47 U.S.C. § 152. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Under this dual jurisdiction, incumbent local exchange carriers ("LECs") historically have "been protected from competition by State and local government barriers to entry." H. Rep. at 49. In contrast, federal authorities over time promoted the development of competition in interstate markets.

The FCC first introduced competition in the market for the sale and lease of telephones (which are used for

[4] *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 89 (July 24, 1995) ("H. Rep.").

both interstate and intrastate calls), and then for other equipment. *See Carterfone*, 13 F.C.C.2d 420 (1968). Local telephone monopolists and state public utility commissions jointly fought those efforts on the ground that the FCC had exceeded its jurisdiction by regulating equipment used for intrastate services. The courts of appeals rejected such challenges because the facilities at issue were used inseparably for both interstate and intrastate service.[5] The FCC also promoted competition in interstate long distance service. In particular, it required incumbent local monopolists to interconnect existing local networks with the facilities of the new competing long distance carriers (such as MCI) so that long distance calls could be originated and terminated.[6]

Incumbents nevertheless continued to use their control over the existing network to discriminate against competitors in ways that evaded regulatory control. To halt that anticompetitive conduct, the Department of Justice brought a landmark antitrust suit which resulted in the consent decree that broke up the Bell System. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). As a result, there is now vibrant competition in the markets for telephone equipment and interstate long distance service. *See AT&T Reclassification*, 11 FCC Rcd. 3271, 3312 (1995) (noting rapid decline in long distance prices).

Notwithstanding these changes, the States persisted in preventing competition in intrastate markets. The individual telephone companies created by the break-up of the Bell System simply inherited pre-existing local monopoly franchises and continued to operate them as such. It was not until the 1990s that a few states began even to contemplate local competition, and their initiatives produced

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[5] *E.g. North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *National Ass'n of Reg. Util. Comm'nrs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

[6] *E.g. Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Util. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975).

only very limited competitive entry in seven states.[7] By 1996, incumbent LECs still received over 99% of all local service revenues. *See* NPRM at ¶ 6 & n.13.

The 1996 Act. In the 1996 Act, Congress radically changed the balance between state and federal regulatory authority that had prevailed under the 1934 Communications Act, as well as the substantive policies that had prevailed under the old regime of state regulation. Abandoning its prior acquiesence to state-regulated local monopolies, Congress adopted new uniform *federal* requirements designed to eliminate legal and economic barriers to all forms of local telephone competition—requirements that applied to both intrastate and interstate uses of the local network. Congress expressly preempted any state laws and regulations that had prohibited, or had the effect of prohibiting, new entrants from offering intrastate telephone service. 47 U.S.C. § 253(a). Congress also adopted substantive federal requirements designed to reduce economic and practical barriers to entry by authorizing new entrants to make use of existing local networks.

The 1996 Act establishes three complementary routes new entrants can use to compete in local markets—each providing for the entrants' use of existing local networks. The first is facilities-based competition. "Interconnection" makes such competition possible. 47 U.S.C. § 251(c)(2). Once a new entrant begins constructing its own network facilities, it must be allowed to "interconnect" with the existing network so that its customers can make calls to and receive calls from the LEC's customers. Without interconnection, a new entrant would have to construct a duplicate network able to reach every home and business in a local service area. But even with interconnection, widespread competition will not develop promptly through facilities-based entry alone, because new entrants can

[7] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking at ¶ 5, CC Docket No. 96-98, FCC 96-182 (rel. Apr. 19, 1996), 11 FCC Rcd. 14171 (1996) ("NPRM").

offer competitive service *only* to customers they reach with their own facilities. As Congress recognized, substantial facilities-based competition will not occur quickly, "because the investment necessary is so significant." *See* H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 148 (Jan. 31, 1996) ("Conf. Rep.").[8]

The Act's second route for entry is "resale." § 251 (c)(4). Incumbent LECs must permit new entrants to purchase their retail services at wholesale rates so that new entrants can compete by reselling existing services to retail customers. Resale allows quick entry, but holds the least prospect for genuine, sustained competition. Because the wholesale rate is calculated by subtracting from the retail rate the LEC's "avoided costs"—that is, the costs the LEC will not incur by virtue of not being a retailer (47 U.S.C. § 252(d)(3))—resale presents only limited opportunities for price competition. Wholesale rates will often be significantly above the forward-looking economic cost of providing service, and thus above the rates that would exist in a competitive market. Nor will new entrants be able to use resale to innovate by offering new products and services the LECs do not now provide. New entrants may only resell the exact same services the incumbent LEC offers its local customers.

The third route for entry set forth in the 1996 Act is leasing elements of the existing network. Specifically, § 251(c)(3) imposes on incumbent LECs the duty to provide to new entrants "non-discriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." This method offers a significant prospect for real competitive choices for a large number of customers in the near term.

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[8] The FCC estimated that an investment of more than $29 billion would be required today to construct local networks capable of reaching even 20% of available subscribers. NPRM, ¶ 7 & n.15.

To understand why the use of unbundled elements holds the most promise for immediate local competition, it is necessary to review the nature of the local telephone network. The basic physical architecture of the network consists of (i) the interface box attached to the outside of the home or business connecting the phone line to the wires inside the home or business; (ii) the "local loop," which is the wire that runs from the interface box at the customer's premises to the nearest switching center, known as an "end office"; (iii) the telephone "switches" in the end offices (to which the local loops connect) which are simply large computers that direct calls to their intended destinations; and (iv) "transport" facilities, which are the wires that carry calls between switches. To make the physical network function, there are other processes and capabilities, which Congress has also termed "network elements," including signaling, operator services, and the operations support systems that permit ordering, billing and repairs. 47 U.S.C. § 153(29). Many of these elements are nothing more than computer programs embedded in the switch's software.

By requiring incumbent LECs to make these network elements available on an "unbundled basis," Congress gave new entrants the flexibility to use components of the existing network in innovative ways. A new entrant can use parts of the existing network in combination with its own facilities. For example, a new entrant can install its own switches, and lease local loops and interface boxes from the incumbent LEC to reach customers' homes. Or a new entrant can rely entirely on components of the existing network, but use them to offer services the LEC does not currently offer or to compete in ways that resale does not permit. Furthermore, because the Act requires that the prices for using unbundled network elements be set at cost-based rates (47 U.S.C. §§251(c)(3), 252(d)(1)), new entrants will be able to price their offerings to consumers based on the efficient forward-looking cost of network elements, and thus will be able to drive prices to competitive levels.

In addition, the 1996 Act sets forth a detailed process for translating these substantive federal requirements into working relationships between new entrants and incumbent LECs. Incumbents must negotiate with new entrants over the terms of interconnection, access to network elements and resale. § 251(c)(1). But because monopolists are unlikely to agree to terms that will allow new entrants to take away customers, Congress gave state public utility commissions the authority to convene compulsory "arbitrations" to set terms. Given the complicity of many states in past monopolistic local markets, Congress kept state commissions on a short leash in performing this function. Section 252 specifically dictates that in resolving "any open issues" between the parties in these arbitrations, state commissions are to apply the substantive federal requirements of § 251 and the FCC's implementing regulations. § 252(c)(1). The final terms (both negotiated and arbitrated) are set forth in "interconnection agreements." [9] Congress placed tight time deadlines on this process. States are required to produce final "interconnection agreements" within 9 months of the time a new entrant first requests negotiations. § 252(b)(4)(C). Federal district courts may then review the state commissions' decisions to ensure that they conform to the Act and the FCC's regulations. § 252(e)(6).

Finally, the local competition provisions of the 1996 Act also play a critical role in the process of determining when the Bell Operating Companies (BOCs)—the incumbent LECs created by the break-up of the Bell System—will be allowed to provide long distance service in their regions. Section 271 gives the FCC the responsibility to decide when the BOCs may enter long distance markets from which they are presently barred. In doing so, the FCC must determine whether the access and interconnection provided by the BOC meets a "competitive checklist,"

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[9] These "interconnection agreements" cover more than just "interconnection" provided by § 251(c)(2) of the Act, and include all terms related to access to unbundled elements and resale as well.

which incorporates by reference many of the requirements of §§ 251 and 252. 47 U.S.C. § 271(b)(2)(B).

The FCC Regulations. Congress directed the FCC to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within 6 months of passage of the 1996 Act. § 251(d)(1). The need to have federal rules in effect *before* the start of the state arbitration proceedings led Congress to require the FCC to act promptly: "[I]t is important that the Commission rules to implement [the] new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission['s] rules in requesting access and interconnection." Conf. Rep. at 148-49.

The FCC issued regulations on August 8, 1996. Two critical components of those regulations are at issue here. First, the FCC's Order implemented the 1996 Act's requirements concerning the prices competitors pay to interconnect with the LECs network and to lease network elements. The Act requires that these prices be "just, reasonable and nondiscriminatory in accordance with the . . . requirements of this section and section 252." 47 U.S.C. § 251(c)(2), (3). Section 252, which § 251 incorporates by reference, states that rates are to be "based on the cost . . . of providing the interconnection or network element . . . includ[ing] a reasonable profit." 47 U.S.C. § 252(d)(1).[10] The regulations implementing these statutory requirements established basic pricing methodologies for state commissions to follow in establishing rates in light of particular local conditions. *See Local Competition Order* ¶¶ 618-984.[11]

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[10] The FCC's pricing regulations also implement the statutory provisions governing resale prices and prices for transport and termination. 47 U.S.C. §§ 251(c)(4), 252(d)(2), 251(b)(5).

[11] In substance, the FCC determined that prices had to be based on the forward-looking economic cost of each of the leased elements, plus a reasonable profit. It named the pricing theory it adopted

Second, the FCC issued regulations implementing the statutory unbundling requirements of § 251(c)(3), which requires "nondiscriminatory access" to network elements. One of these FCC rules prohibited LECs from responding to a request for elements that were *already connected* in their networks by physically disconnecting those elements solely for the purpose of making it more difficult and expensive for competitors to use them. 47 C.F.R. § 51.315(b). The FCC concluded that this prohibition was compelled by the text of § 251(c)(3). *Local Competition Order* ¶ 293 ("section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination"). As the FCC explained, absent such a rule, new entrants "would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." *Id.*

Proceedings In the Eighth Circuit. As soon as the regulations were published, the LECs (joined by various state utility commissions on some issues) challenged them. Pursuant to 28 U.S.C. § 1407, the cases were consolidated in the Eighth Circuit. The court stayed the FCC's pricing rules, but left most other rules in place. As a result, the FCC's rules concerning interconnection and access to unbundled network elements governed ongoing arbitrations conducted pursuant to § 252, but its pricing rules did not.

The Eighth Circuit issued a decision on the merits on July 18, 1997, which it modified on rehearing on October 14, 1997. The court first held that the FCC lacked plenary authority to promulgate the regulations implementing the requirements of § 251. Although the 1996 Act expressly required the FCC "[w]ithin 6 months . . . [to] complete all actions necessary to establish regulations to implement the requirements of this section [251]," (47 U.S.C. § 251(d)(1)), the court held that this statutory command was only "a time constraint, directing the Commission to complete expeditiously its rulemaking regard-

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"Total Element Long Run Incremental Cost," or "TELRIC," pricing. Because the Eighth Circuit ruled that the FCC lacked jurisdiction, the substance of those regulations is not at issue.

ing only the areas in section 251 where Congress expressly called for the FCC's involvement." [12]

The court then identified six narrow substantive areas of local telecommunications where, in its view, Congress explicitly authorized the FCC to regulate.[13] Outside these six areas *any* FCC action was *ultra vires.* Pet. App. 12a. Chief among the many areas over which the FCC supposedly lacks jurisdiction is price. The court held that because of "[t]he absence of any direct FCC pricing authority over local telephone service," Pet. App. 13a, the FCC had violated the "plain meaning" of the Act in concluding that it could issue pricing regulations. Pet. App. 14a-15a & n.15.

The court also held that the FCC's pricing rules were barred by § 2(b) of the 1934 Communications Act, 47 U.S.C. § 152(b), which provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to charges, classifications, prac-

[12] The court also rejected the FCC's reliance on its general authority under § 201(b) of the Communications Act, 47 U.S.C. § 201(b), which authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." In the court's view, this provision (and similar provisions on which the FCC had relied (47 U.S.C. §§ 154(i), 303(r)) only authorized regulation of common carriers "engaged in interstate or foreign communication." Pet. App. 12a. Because, in the court's view, the 1996 Act concerns primarily "the rates of local intrastate phone service," which were outside the FCC's "primary directives," the court concluded the FCC had no authority under these jurisdictional provisions to implement the terms of the 1996 Act. *Id.* For similar reasons, the court also concluded that the FCC could not use its traditional enforcement authority under § 208 of the 1934 Act, 47 U.S.C. § 208, to enforce *any* of the 1996 Act's requirements in administrative complaint proceedings.

[13] Pet. App. 12a & n.10. *See* § 251(b)(2) (number portability), § 251(c)(4)(B) (prevention of discriminatory conditions on resale), § 251(d)(2) (identification of network elements), § 251(e) (numbering administration), § 251(g) (continued enforcement of exchange access), and § 251(h)(2) (treatment of comparable carriers as incumbents).

tices, services, facilities, or regulations for or in connection with intrastate communications service." Holding that Congress needs to set out "an unambiguous grant of intrastate authority to the FCC [for it] either to jump over or pass through section 2(b)'s fence," Pet. App. 17a, the Eighth Circuit concluded that in the 1996 Act Congress acted in "exactly the opposite" manner, because "the Act directly and straightforwardly assigns to the states the authority to set the prices." *Id.* The court also rejected the argument that the FCC had authority to regulate because the network elements were intended to be used inseverably for interstate as well as intrastate service under a unified regime.[14]

The Eighth Circuit then considered the substantive validity of the remaining rules it found to be within the FCC's jurisdiction. The court struck down many of the rules as inconsistent with the Act's plain meaning. In particular, the court invalidated §§ 51.315(c)-(f) of the FCC's rules, which required incumbent LECs to combine network elements in any manner requested by a new entrant, on the ground that the Act unambiguously requires the competitors themselves, not the LECs, to do the combining of network elements. Pet. App. 52a-53a.[15]

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[14] Relying on § 2(b) the court also vacated FCC regulations concerning exemptions for rural carriers, Pet. App. 30a, the FCC's jurisdiction to hear complaints under Section 208, Pet. App. 31a-32a, and the standards for reviewing interconnection agreements entered into before the effective date of the Act, Pet. App. 34a. As to each of these regulations, the court concluded that Congress had intended the states, not the FCC, "to dictate the substantive standards" necessary to implement the Act's requirements. Pet. App. 29a-30a.

[15] The court also vacated as unreasonable or contrary to the Act's plain meaning the FCC's regulations implementing the 1996 Act's "pick and choose" provision, Pet. App. 24a-27a, rules implementing the agency's interpretation of the preemptive effect of its own regulations, Pet. App. 36a-40a, rules implementing the agency's interpretation of "the standards to determine which elements must be unbundled," Pet. App. 46a, and rules implementing the agency's

On rehearing, the court went further, vacating the one "combination" rule it had previously left standing, 47 C.F.R. § 51.315(b), the prophylactic rule against anti-competitive disconnection of requested network elements that are already connected. In the court's view, when a competitor requests two network elements that are already combined, the LEC is to "uncombine" them, and the competitors must then do the "actual [re]combining" of those elements. Pet. App. 52a-53a.

Petitioner now seeks review of the Eighth Circuit's decision denying the FCC the authority to promulgate rules to implement the full range of § 251's requirements (as well as its authority to enforce those requirements), and its decision invalidating § 51.315(b) of the FCC's rules on substantive grounds.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Eighth Circuit's decision has dealt a crippling blow to the 1996 Act's principal objective: creating competition in local telephone markets "as quickly as possible." H. Rep. at 89. The 1996 Act "was an unusually important legislative enactment." *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2337 (1997). It sets comprehensive national policy for one of the most significant and dynamic parts of the American economy, and is intended to benefit every American home and business. The Eighth Circuit has made achieving the Act's goals all but impossible. For new entrants like MCI, the marketplace effects of the Eighth Circuit's ruling have been devasting.

1. In critical respects, the Eighth Circuit arrogated to itself the role of national telecommunications policy maker, in disregard of the "dominant, well-settled principle of federal law" requiring "[j]udicial deference to reasonable interpretations by an agency of a statute that

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interpretation of the quality of access LECs must provide to competitors, Pet. App. 50a-52a.

it administers." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). *See Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). For example, without any understanding of the destructive consequences its ruling would have on the prospects for local competition, the Eighth Circuit struck down § 51.315(b) of the FCC's rules—which proscribes discriminatory conduct the FCC concluded would "seriously and unfairly inhibit[]" new entrants' ability to compete using network elements. Although the court purported to act on the basis of the Act's "plain meaning," in truth the panel reached out to resolve policy issues in a manner utterly at odds with both the statutory text and Congress' goals. This aspect of the Eighth Circuit's decision "effectively has killed off local competition" in much of the local market.[16]

2. In other critical areas, the Eighth Circuit stripped the FCC of the authority to prescribe uniform national rules implementing the 1996 Act's requirements. In particular, the court refused to give effect to § 251(d)(1) of the Act, which authorizes the FCC to "establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d)(1). Again purporting to rely on the Act's "plain meaning" but in fact drawing inferences from legislative silence, as well as relying on an entirely unprecedented construction of § 2(b) of the 1934 Communications Act (47 U.S.C. § 152(b)), the Eighth Circuit

[16] *Court Ruling May Close Door On Leasing of Network Elements by CLECs*, Communications Today, Oct. 16, 1997, quoting Anna-Maria Kovacs of Janney, Montgomery, Scott. *See also* Seth Schiesel, *Local Bells Win Another Victory To Block Rivals*, The New York Times, Oct. 15, 1997, at 1 ("The plans of long-distance telephone companies to get into local telephone markets were dealt a major blow yesterday as a Federal appeals court threw out regulations that were intended to foster competition with local telephone incumbents."). Indeed, almost 2 years after the Act's passage, incumbent LECs still control 99% of the market. *See* Yankee Group, eds., *The Unbearable Lightness of Local Competition*, White Paper Vol. 14, No. 8, (May 1997) at 1. Excerpts have been lodged with the Court.

ruled that the FCC could not prescribe regulations to implement the pricing requirements of § 251.

3. This case presents precisely the kinds of "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The Eighth Circuit's invalidation of § 51.315(b) of the FCC's rules jeopardizes the continued availability of the entry strategy holding the greatest prospect for widespread competition in the near term—unbundled network elements. The Eighth Circuit's decision to strip the FCC of much of its implementing authority is likewise having enormous effects, both in the marketplace and in the courts. Authority to interpret and implement the Act is now haphazardly dispersed: the FCC may prescribe uniform national rules for some of § 251's requirements, while others will be interpreted and applied by 50 state utility commissions, then reviewed by federal district courts in 50 states, and ultimately rationalized (if at all) only after years of appeals.

4. There is a pressing need for immediate review. The Eighth Circuit has effectively set telecommunications policy for the entire nation. Moreover, the Eighth Circuit's interpretations of §§ 251 and 252 have cast doubt on the validity of every existing arbitrated interconnection agreement between an incumbent LEC and a new entrant, and are being used by LECs to challenge those agreements in more than 70 pending cases under § 252(e)(6) of the Act. Similarly, jurisdictional disputes between the FCC and the states have already arisen in proceedings under the companion provisions of § 271 of the Act, and the scope and number of such disputes is certain to increase as the BOCs seek to enter long distance markets. Thus, the questions raised in this petition should be definitively settled now.

I. THE EIGHTH CIRCUIT'S DECISION INVALIDATING § 51.315(b) OF THE FCC'S RULES CONFLICTS WITH *CHEVRON*, AND HAS HAD A DEVASTATING EFFECT ON LOCAL COMPETITION.

Review of the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(b) is urgently needed. The rule states that "except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." The reason for such a rule is obvious. When a *LEC* signs up a new customer, *it* does not senselessly break apart the constituent parts of its network and then piece them back together prior to providing service for that customer—and thus does not bear any cost of "recombining" the elements into a finished service. Section 51.315(b) simply placed the potential competitor in the same position as the incumbent LEC, preventing the LEC from exploiting its position as a monopoly vendor by imposing discriminatory costs on its rivals. The restriction also prevented the LEC from making interruption of service a necessary consequence of a customer's decision to change from the LEC to a competitor. Thus, § 51.315(b) simply forbade discriminatory and economically wasteful conduct on the part of incumbent LECs.

The Eighth Circuit's decision invalidating this regulation warrants review because it conflicts with this Court's decisions establishing the proper relationship between a reviewing court and an expert administrative agency charged with implementing a federal statute, and because the Eighth Circuit's overreaching has profoundly disrupted progress toward competition in local markets. These are plainly matters of national importance.

1. This was not a case in which a court could properly second-guess the FCC's policy judgment. The Eighth Circuit's decision to invalidate § 51.315(b) would have been justified only if "Congress ha[d] . . . directly addressed the precise question at issue" and if the plain terms of the statute *unambiguously foreclosed* the FCC's rule. *Chevron*, 467 U.S. at 843. *See Smiley v. Citibank*, 116

S. Ct. 1730, 1733-34 (1996). As will be shown, no fair reading of § 251(c)(3) permits such a conclusion.

a. The Eighth Circuit misread § 251(c)(3) when it concluded that the "plain meaning" of that provision barred the FCC from promulgating § 51.315(b). The court interpreted the requirement in the first sentence of § 251(c)(3) that LECs provide elements "on an unbundled basis" as meaning that LECs were to make network elements available in a physically separated form. It then construed the statement in the second sentence of § 251(c)(3) that LECs must "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service" as meaning that Congress intended for potential competitors (not incumbent LECs) to be responsible for physically reconnecting the elements. Neither term means what the Eighth Circuit thought it meant.

Providing elements of the network on an "unbundled basis" does not mean physically splitting the network into its constituent components and providing those components in that form. Rather, "unbundle" is a pricing term uniformly defined as "to separate the charges for related products and services usually sold as a package." *Random House Dictionary of the English Language*, p. 2005 (2d Ed. Unab. 1981).[17] When Congress required incumbent LECs to offer potential competitors access to network elements "on an unbundled basis," the substance of its command was that individual parts of the network had to be *priced* and offered separately so that competitors could purchase whatever elements or combinations of elements they needed.

Just as the Eighth Circuit misinterpreted the term "unbundled" in the first sentence of § 251(c)(3), it miscon-

[17] *See also Webster's New Collegiate Dictionary* (Merriam, 1981), p. 1623 ("to give separate prices for equipment and supporting services; to price separately"); *American Heritage Dictionary*, p. 1315 (2d Col. Ed. 1991) ("[t]he separate pricing of goods and services").

strued the command in the second sentence that LECs "provide such unbundled network elements in a manner that allows requesting carriers to combine" them into a "telecommunications service." What the court described as the "plain meaning" of this provision is in truth an *inference* the court drew based on its patently false assumption that "unbundling" and "combining" are antonymous terms connoting physical actions taken by a LEC and a new entrant, respectively, to break apart and put back together the telephone network. The statute's text, however does not purport to allocate responsibilities in this way. It simply forbids LECs from artifically restricting the uses to which new entrants can put network elements. Indeed, the Eighth Circuit has it exactly backwards. As a result of the court's ruling, LECs may "provide such unbundled network elements in a manner that" *does not* "allow requesting carriers to combine them in order to provide . . . telecommunications service," because LECs may impose costly, needless burdens that make it impossible to use network elements in combination.

Consistent prior usage of the term "unbundled" confirms the Eighth Circuit's error. In 20 years of FCC regulations, "unbundled access" uniformly meant separate pricing—not physical separation. When the FCC required "unbundling" of telephone sets from local service, all that meant was the telephone set was priced separately, and the customer had the option of replacing it with a telephone from another source, or continuing to lease it at a separate price from the LEC. The LEC did not go to the customer's home and rip the phone set from the wall, forcing the customer to reconnect it.[18] And this was the uniform interpretation given the term when the FCC unbundled the features used to provide enhanced services,[19] and other aspects of the network used to provide

[18] *Second Computer Inquiry*, 77 F.C.C.2d 384, 388, 443-44 (1980), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[19] *Third Computer Inquiry*, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic

exchange access service. *See, e.g., California v. FCC*, 39 F.3d 919, 927 (9th Cir. 1994).

The Eighth Circuit's reading of the term "unbundled" is also irreconcilably in conflict with the 1996 Act's definition of "network elements." (47 U.S.C. § 153(29)). As the court recognized elsewhere in its opinion, network elements consist not only of the "physical parts" of an incumbent's network, but also of "features, functions, and capabilities" that do not correspond to individual, physically separate parts of the network. Pet. App. 42a-43a. For example, Congress expressly identified "signaling" as a network element. But signaling is not a physically separate part of the network; signaling is simply a network function provided through a combination of separate physical parts, including switches and transport facilities that carry signaling information. Other elements are nothing more than software instructions in a computer. When Congress commanded unbundling of such elements, it cannot possibly have intended that they be provided in physically separate form.

Thus, this was not a case in which the "plain meaning" of the statute foreclosed the agency's policy choice. Even if the Eighth Circuit's reading of the statutory text were consistent with some dictionary definitions (and the court cited none), the existence of multiple alternative dictionary definitions supporting the FCC's interpretation is enough by itself to prove that the FCC had discretion to interpret the statute as it did. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); *Sullivan v. Everhart*, 494 U.S. 83, 91-92 (1990).

b. The Eighth Circuit's reading of the second sentence of § 251(c)(3) also crashes head-on into the first sentence of that provision, which requires "non-discriminatory access" to network elements. Forcing competitors to take network elements on a disassembled basis when they are

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Service Elements that they use") *vacated on other grounds by, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

already combined in an incumbent's network "would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled network elements." [20]

c. Finally, there is no plausible policy justification for the Eighth Circuit's decision. The Eighth Circuit explained that its version of "unbundling" would serve to raise the cost of using unbundled elements, so that relying entirely on network elements would not become a less costly way to enter local markets than resale. *See* Pet. App. 71a (leasing of "combined" elements without additional costs associated with "recombining" would "obliterate the careful distinctions Congress has drawn" between leasing unbundled elements and purchasing local telephone service at wholesale rates for "resale" to customers).

The very articulation of such a policy rationale makes plain that the court was not simply following an unambiguous statutory text. It was instead attempting to reconcile what it perceived as conflicting statutory commands: the opportunity in § 251(c)(3) to rely entirely on unbundled elements to provide local service and the opportunity in § 251(c)(4) to resell LEC services. Even if it were the court's job to resolve such a conflict (and it is not), the conflict here is entirely manufactured. The FCC determined (once again in findings ignored by the Eighth Circuit) that there was no risk that the distinction between these two different methods of entry would be "obliterated" by its rule prohibiting discrimination in element provisioning, because the two routes of entry are quite distinct. *Local Competition Order* ¶¶ 332-334. Providers of service through combinations of elements face

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[20] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, at ¶ 44, CC Docket No. 96-98, FCC 97-295, (rel. Aug. 18, 1997), *petitions for judicial review pending*, *U S West, Inc. et al. v. FCC*, Nos. 97-3576 et al. (8th Cir. filed Sept. 5, 1997).

risks that resellers do not. A reseller has a guaranteed margin that can be calculated in advance, since it simply purchases services its customers request, at a discounted rate. A competitor that provides service through combinations of unbundled network elements, in contrast, bears the risk that it will purchase elements to provide service, while its customers "will not demand a sufficient number of services using that facility for the carrier to recoup its costs." *Id.* ¶ 334.[21] As the FCC explained, Congress' purpose was not to "express[] a preference for one particular entry strategy," but to create alternative paths new entrants could employ "as market conditions and access to capital permit." *Local Competition Order* ¶ 12.

d. Although the Eighth Circuit's decision would appear to be clearly wrong, at the very least it is sufficiently open to question that it should not be allowed to stand as the last word in national telecommunications policy on a matter so central to implementation of the 1996 Act.

2. The consequences of the Eighth Circuit's decision invalidating § 51.315(b) vividly illustrate the wisdom of *Chevron*. The Eighth Circuit blithely ignored a specific FCC finding that "new entrants . . . would be seriously and unfairly inhibited in their ability to use unbundled network elements" absent a prohibition of the kind contained in § 51.315(b). *See Local Competition Order* ¶ 293. In so doing, the court gave incumbent LECs a ready means to shut down local competition in much of the market.

The LECs have pounced on this opportunity. Many have simply refused to process orders from potential com-

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[21] For example, any decision by a potential competitor to provide service entirely through network elements requires the purchase of switching capabilities, including the capability to provide vertical features (such as call forwarding) that must be paid for by the potential competitor whether or not it is able to sell those capabilities to its customers.

petitors for elements in combination.[22] Others have insisted that potential competitors must now go through a costly process whenever they seek to order a combination of the local loop and a switch. Even though those elements are already connected in the existing LEC network, the LECs are insisting on disconnecting the elements from each other and forcing MCI to (1) construct a so-called "collocation cage" (with all the attendant costs of upkeep such as heating, ventilation and air conditioning) in the LEC end office containing the switch, (2) run wires from the end of the local loop and from the switch into the cage, (3) install equipment within the cage to connect the loop to the switch, and (4) employ technicians to perform that function—all to hook together wires that the incumbent arbitrarily disconnected.[23] Still other LECs have insisted that, instead of allowing MCI to perform this work, they would simply charge MCI the imputed value of what it would cost MCI to do so. All of these stratagems increase the cost to potential competitors of using unbundled elements well past the point at which it is profitable for competitors to use them to provide service.

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[22] For example, US WEST (the monopolist serving most Western States other than California and Nevada) informed the Minnesota Public Service Commission that MCI "is precluded by the [Eighth Circuit] Court's orders and mandate from placing further orders for network elements on a combined basis." US WEST letter to Minnesota Public Utilities Commission (Oct. 24, 1997). These and other documents referred to in this paragraph have been lodged with the Clerk of the Court.

[23] For example, in filings before the New York Public Service Commission, Bell Atlantic has taken the position that in light of the Eighth Circuit's ruling a potential competitor seeking to order combinations of unbundled network elements would have to lease space and install equipment to recombine the elements. Supplemental Petition in Case No. 97-C-0271 (Nov. 6, 1997) at 26 n.29.

The 1996 Act does give new entrants a right to collocate in LEC end offices, 47 U.S.C. § 251(c)(6), but new entrants were given that right for the very different purpose of allowing new entrants to integrate their own facilities efficiently with the LECs' facilities.

The FCC predicted—again in findings ignored by the Eighth Circuit—that new entrants would be "denied a meaningful opportunity to compete" if LECS were permitted to impose these kinds of added costs. *Local Competition Order* ¶ 312. In practice the use of unbundled elements was likely the only economically feasible means of competing for major segments of the local market in the near term. The Eighth Circuit now has assured that fledgling competitors seeking to use unbundled elements in any manner will face an insurmountable competitive disadvantage.[24]

The Eighth Circuit badly miscalculated these potential consequences. The court assumed the additional costs faced by the new entrant would be those associated with gaining physical access to the existing network to put back together elements the LEC had disassembled. Bad as this is, the FCC had previously determined that incumbent LECs would never grant potential competitors access to their networks, and that "it [is] impossible for potential competitors that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents." *Local Competition Order* ¶ 293. The Eighth Circuit simply dismissed those findings, stating that the very fact of the incumbent LECs' challenge to § 51.315(b) "indicates . . . that they would rather allow entrants access to their networks than have to rebundle the elements for them." Pet. App. 53a. Just as the expert agency predicted, however, no LEC has agreed to allow MCI or other potential competitors access to its network.[25] This is precisely why the judiciary should

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[24] Competition through *resold* services will not be enough to pry open local monopoly markets. The wholesale price of such service is simply too high, which is why, nearly two years after the 1996 Act made resale possible, few competitors are entering the market on a wide scale with resold products.

[25] For example, Southwestern Bell, the LEC serving Texas and other states in the Southwest, has recently indicated to the Texas

not second guess an expert agency on a technical policy judgment.

In view of these consequences, review is plainly warranted.

II. THE EIGHTH CIRCUIT IMPERMISSIBLY STRIPPED THE FCC OF JURISDICTION CONGRESS GAVE IT TO IMPLEMENT THE 1996 ACT.

The Court should also grant certiorari on a second, equally important question: whether the Eighth Circuit has improperly stripped the FCC of the authority Congress gave it to interpret and enforce critical requirements of the 1996 Act. In particular, the Eighth Circuit denied the FCC authority to implement the pricing requirements of § 251(c), the dialing parity requirements set forth in § 251(b)(3), the exemptions for rural carriers set forth in § 251(f), and the requirement of § 252(a)(1) that carriers submit preexisting agreements to state commissions for review. The Eighth Circuit also divested the FCC of its well-established authority under § 208 of the Act—which expressly authorizes the FCC to adjudicate complaints by "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this [Act]"—to decide any issue arising under the local competition provisions of the 1996 Act, and gave that authority to state commissions despite the absence of any textual basis for doing so.

This Court should review the Eighth Circuit's jurisdictional ruling for two reasons. *First*, it conflicts with the statute and with decisions of other courts of appeals. *Second*, unless the decision is reversed, there is virtually no prospect for coherent administration of the local competition provisions of the 1996 Act.

Commission in declining to provide such access that "it has grave concerns regarding the implications of such an order on the security, integrity and reliability of its network; the quality of its service, and the privacy of its customers." Texas PUC Docket Nos. 16189 *et al.*, Brief on Eighth Circuit Alternatives, (Oct. 27, 1997) at 11, lodged with the Court.

1. a. The "plain meaning" of §§ 251 and 252 does not confine the FCC to the six narrow areas the Eighth Circuit specified. *See supra* n.13. Section 251(d)(1) expressly authorizes the FCC to "complete all actions necessary to establish regulations *to implement the requirements of this section*" within 6 months of the date of enactment. 47 U.S.C. § 251(d)(1) (emphasis added). Chief among § 251's requirements is that rates for interconnection and access to unbundled elements be "just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and Section 252." 47 U.S.C. § 251(c)(2), (c)(3). Section 251(d)(1) does not include the qualifying language the Eighth Circuit read into it—*i.e.*, that the FCC may implement only those requirements of § 251 that the 1996 Act elsewhere gives the FCC the explicit responsibility to implement.

The Eighth Circuit went to great lengths to explain away this express grant of rulemaking authority. First and foremost, it concluded that § 251(d)(1) is merely "a time constraint," Pet. App. 12a, and not a grant of authority.[26] But it is simply not plausible to claim that § 251(d)(1) is only a time limit and not a grant of authority, when it is literally both.

Moreover, having discarded the express grant of authority supporting the FCC's issuance of implementing regulations, the Eighth Circuit faced a dilemma. Several provisions of § 251 plainly presuppose that the FCC *does* have the authority to issue rules—indicating that such authority must have been conferred by other provisions. For example, § 251(d)(2) states that "[i]n determining what network elements should be made available for pur-

[26] Similarly, the court held that § 201(b) of the Act merely authorizes regulations implementing the interstate requirements of federal law. But the plain language of § 201(b) authorizes the FCC to issue regulations implementing all provisions of the Act, not just those provisions dealing with interstate matters. 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act.]").

poses of subsection (c)(3) of this section, the Commission shall consider" certain particular issues. The Eighth Circuit sought to work its way out of this dilemma by interpreting these provisions *alluding* to FCC rules as though they were express grants of authority to promulgate these particular rules. But these provisions do not use language granting rulemaking authority.

Equally suspect is the court's conclusion that § 252 of the Act divests the FCC of pricing authority. The Eighth Circuit found it significant that § 252 authorizes state commissions to "establish . . . rates" and that there is no "reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices." Pet. App. 13a. But there is no inconsistency between authorizing the FCC to promulgate a uniform national regulation prescribing a rate setting methodology, and instructing state commissions to establish rates consistent with that methodology.[27]

The Eighth Circuit's contrary conclusion rests not on the "plain meaning" of the statutory text, but on a negative inference drawn from alleged legislative silence. This is not sufficient. Under *Chevron*, when a statutory provision is "silent or ambiguous with respect to [a] specific issue," reviewing courts must defer to the agency. 467 U.S. at 843. In any event, § 252 is not silent: it expressly instructs state commissions to resolve any "open issue" in arbitrations in accordance with "the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. § 252(c)(1). Congress did not need to repeat that instruction when, in the immediately following subsection, it

[27] Similarly, Congress plainly assumed the FCC would have the authority to issue *pricing* rules because 47 U.S.C. § 160 expressly gives the FCC the authority to forbear from enforcing regulations regarding "charges" issued pursuant to § 251(c). Obviously, Congress would not so carefully have given the FCC authority to forbear from *enforcing* regulations if Congress believed the FCC would not have authority to *issue* such regulations.

instructed state commissions to "establish any rates." 47 U.S.C. § 252(c)(2).

Finally, if the Eighth Circuit's interpretation of §§ 251 and 252 of the Act were correct, the 1996 Act's constitutionality would be called into question. In the Eighth Circuit's view, Congress delegated to state commissions not only the power to apply federal law to the particular facts in their states (that is, the power to adjudicate or "establish rates") but also the power to *make* federal law by "dictat[ing] the substantive standards" not established by Congress. Pet. App. 29a-30a.

That cannot be a proper reading of the Act. Congress may delegate lawmaking power to *federal* agencies, but only because federal agencies are supervised by the President and are thus accountable to the national electorate. But the Constitution does not authorize Congress to delegate federal lawmaking authority to *state agencies*. *See Printz v. United States,* 117 S. Ct. 2365, 2378, 2581 (1997) (unlawful to transfer federal executive power to "the 50 States, who are left to implement the program without meaningful Presidential control"). And, the role the Eighth Circuit gives to the states to "dictate the substantive standard[s]" of the 1996 Act would appear to be an executive function subject to this constitutional rule. *See Bowsher v. Synar,* 478 U.S. 714, 733 (1986) ("[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"). This constitutional infirmity is itself a powerful reason to review the Eighth Circuit's interpretation.

b. The Eighth Circuit also has interpreted § 2(b) far more broadly than any other court has ever found appropriate, thereby drastically constricting the scope of the FCC's authority under the 1996 Act. The Eighth Circuit held that "in order to qualify for the 'unambiguous' exception to § 2(b), a statute must *both* unambiguously apply to intrastate telecommunications matters *and* unambiguously direct the FCC to implement its provisions." Pet. App. 19a (emphasis in original). The Eighth Circuit thus concluded that § 2(b) denies the FCC jurisdiction even

in areas that are expressly the subject of *federal* substantive requirements.

That reading of § 2(b) is not supported by any prior decision of any court. If left undisturbed, it would drastically curtail the FCC's ability to implement and enforce the requirements of § 251 of the Act because it forecloses the FCC from issuing interpretive regulations respecting *anything in* § 251 other than those few topics as to which the Act specifically mentions FCC regulations. *See supra* n.13. Nor is there any sense to such a restriction. Section 2(b) prevents the FCC, in the guise of exercising its *ancillary* jurisdiction, from regulating beyond the substantive reach of federal law. It has never before been interpreted to mean that the FCC's regulatory authority stops short of the substantive reach of federal law. Moreover, applying the Eighth Circuit's novel understanding of § 2(b) here converts Congress' allocation of authority between federal and state authorities under the 1996 Act into a nonsensical game of chance. Where the 1996 Act happens to make a passing reference to a particular topic of FCC regulations, the FCC may regulate. Where the Act does not, the FCC is stripped of jurisdiction—this in a statute that expressly directs the FCC to issue plenary regulations.

The Eighth Circuit's reading of § 2(b) also conflicts with numerous court of appeals' decisions holding that § 2(b) does not bar the FCC from regulating facilities inseverably used for both interstate and intrastate service. *See NARUC v. FCC*, 746 F.2d 1492, 1496-1500 (D.C. Cir. 1984); *California v. FCC*, 4 F.3d 1505, 1513-14 (9th Cir. 1993); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977). Applying this previously well-accepted rule, the FCC had the authority, for example, to break the monopoly over the lease of telephone equipment, since telephones, though used predominantly for local calls, are also used for long-distance calls. The network elements that LECs must make available pursuant to § 251 are in this respect just like telephones: they are

indisputably used inseparably both for intrastate service (local service and intrastate toll service) and for originating and terminating interstate long distance calls.

The Eighth Circuit rejected the "inseverability" test used by every other circuit and created a completely different test. In its view, if a service is "fundamentally intrastate [in] nature," having only a "tangential impact on interstate service," that impact is "not sufficient to overcome the operation of section 2(b)." Pet. App. 23a. The Eighth Circuit thought it could depart from the prevailing inseverability rule because a separations process would allow the FCC to set rates for interstate uses of the local network. But Congress contemplated a single rate for *all* uses—intrastate and interstate—of the existing local network by potential competitors. § 252(d)(1). Therefore, when the Eighth Circuit denied the FCC the power to make rules, it effectively stripped the FCC of its traditional and undisputed authority over *interstate* services.

2. The local competition provisions of the 1996 Act stand at a critical juncture. The question is whether an enactment of sweeping national importance will be interpreted and administered in a coherent manner that holds some prospect of achieving Congress' purposes, or whether authority for implementing the Act will instead be dispersed haphazardly among the FCC, state commissions, and federal district courts. The Eighth Circuit's ruling has committed the nation to the latter course. It has left in place FCC rules uniformly implementing certain of the Act's requirements, while giving state commissions the authority "to dictate the substantive standards" necessary to implement other requirements, with the result that the 1996 Act now means different things in different states. Dozens of cases have been brought in federal district courts across the country pursuant to § 252(e)(6) challenging "interconnection agreements" containing these state commission decisions. In the large majority of those cases, either the prospective competitor or the incumbent

LEC has raised a challenge to the pricing methodology adopted by the state commission. Thus, the question of what pricing methodology §§ 251 and 252 allows or requires will be litigated in fora across the country, and then appealed, and the question may well remain unsettled for many years.

Far from settling the respective roles of the FCC, state utility commissions, and the federal courts, the Eighth Circuit's unprecedented analysis will lead to constant warfare over the proper scope of the FCC's authority under the 1996 Act. That is most obviously true with respect to any future regulations the FCC promulgates to implement the specific requirements of § 251. Turmoil will also reign over the FCC's authority under § 271 of the Act, the provision governing whether Bell Operating Companies will be permitted to provide interstate long-distance service to customers in their regions. Congress specifically vested the FCC with the power to decide when a Bell Company should receive such authority. Section 271 requires the FCC to decide whether a Bell Company applying for long distance authority has met the requirements of a "competitive checklist." The checklist expressly incorporates by reference many of the requirements of § 251, including its pricing requirements and other requirements the Eighth Circuit concluded the FCC lacked authority to implement. The text of § 271 plainly contemplates that the FCC will render an independent judgment whether the checklist is met in deciding whether to grant a BOC application. Yet when it does so it will necessarily have to evaluate precisely the same issues the Eighth Circuit said were committed to state commissions. Thus, every application under § 271 will trigger a fight over jurisdiction. Indeed, that is already occurring. Several states and incumbent LECs have sought mandamus from the Eighth Circuit because the FCC made an independent determination in a § 271 application as to whether the prices at issue complied with § 252(d) of the Act. That mandamus petition is still pending.

Similar jurisdictional conflicts could arise when the FCC exercises its authority under § 253(d) of the 1996 Act to preempt state actions that stand as a barrier to competition in the intrastate market. If a state adopts a pricing methodology pursuant to § 252 that prices network elements so high as to constitute a barrier to entry, the FCC could act under § 253(d) to preempt the state's decision.

These results would be antithetical to Congress' goals. The 1996 Act demanded FCC regulations within 6 months of the Act's passage precisely because Congress believed that local competition stood the best chance of developing quickly with enunciated rules in place upon which the regulated community could rely. The Eighth Circuit's decision to oust the FCC from its customary role in enforcing uniform federal policy and to substitute enforcement by a crazy quilt of competing policymakers disserves that legislative strategy. Congress' manifest intention to resolve speedily the foreseen regulatory issues is another reason strongly counseling review by this Court now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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